Filed 6/26/09 1939 Argyle, LLC v. First American Ins. Co. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

1939 ARGYLE, LLC, et al., Plaintiffs and Appellants, v. FIRST AMERICAN TITLE INSURANCE COMPANY, Defendant and Appellant.	B206787 (Los Angeles County Super. Ct. No. BC350110)

APPEALS from orders and judgment of the Superior Court of Los Angeles County, Paul Gutman, Judge. Plaintiffs' appeal, reversed; defendant's appeal, affirmed.

Valle & Associates, Jeffrey B. Valle, and Steven M. Ragona for Plaintiffs and Appellants.

Garrett & Tully, Robert Garrett, and Ryan C. Squire, and Trang T. Tran for Defendant and Appellant.

Plaintiffs, appellants, and cross-respondents 1939 Argyle, LLC, Jonathan Lehrer-Graiwer, and 2218 N. Beachwood Drive, LLC (collectively, buyers) are the purchasers (or their assignors) of an apartment complex located at 1939 Argyle Avenue in Hollywood, California (the property or the Argyle property). Woodman Realty, Inc. (Woodman), not a party to this appeal, is the former owner of the property. Defendant, respondent, and cross-appellant First American Title Insurance Company (First American) is the escrow company that handled the sale of the property from Woodman to buyers.

During escrow, a dispute arose between buyers and Woodman about the date by which buyers were required to waive the financing contingency. When buyers failed to waive the financing contingency by the date by which Woodman believed they were required to do so, Woodman cancelled the sale. Buyers sued Woodman for specific performance, and the parties settled the case while it was on appeal from a judgment in buyers' favor. As a result of the settlement, buyers purchased the property from Woodman for approximately $1.2 million more than the original purchase price.

After settling with Woodman, buyers filed the present action against First American, contending that the dispute over the financing contingency was not timely resolved because First American negligently failed to deliver supplemental escrow instructions to Woodman. The case proceeded to trial on buyers' breach of contract and negligence claims, and the jury returned a special verdict for buyers, awarding them damages of more than $1.7 million.

First American moved for judgment notwithstanding the verdict and a new trial. The trial court denied the motion for judgment notwithstanding the verdict, but it granted a new trial, concluding that the settlement of the prior action was an independent intervening cause of buyers' damages.

Buyers appealed from the grant of a new trial, contending that the trial court's ruling was erroneous as a matter of law. First American cross-appealed from the judgment and the denial of its motion for judgment notwithstanding the verdict, contending that: (1) buyers failed to prove causation; (2) buyers' damages were not

reasonably foreseeable; (3) buyers' negligence claim is time-barred; and (4) buyers' damages should be reduced. We reverse the grant of a new trial and reinstate the judgment for buyers.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Purchase and Sale Agreement

In the summer of 2001, Woodman listed the Argyle property for sale through the real estate brokerage firm of CB Richard Ellis (CBRE). The asking price was $2,940,000.

On May 10, 2002, Greg Brogger, a real estate investor, sent a letter of intent on behalf of himself and investor Mark Johnson, proposing to purchase the property for the full asking price. Woodman accepted the proposal and signed the letter of intent, which anticipated the drafting and execution of "a formal Purchase and Sale Agreement and Escrow Instructions and open[ing of] escrow with First American Title Insurance Company." The letter of intent also contained an acknowledgement by buyers and seller that "CB Richard Ellis, Inc. is representing both Buyer and Seller as a dual agent in this transaction and [buyers and seller] have therefore not dealt with any other real estate brokerage firm in connection with this transaction other than CB Richard Ellis."

Upon receiving the signed letter of intent, CBRE prepared a purchase agreement and joint escrow instructions to be signed by both parties. The purchase agreement provided, among other things, that the purchase was contingent on buyers obtaining a loan for $2 million (the financing contingency), and it provided that buyers had 45 days to waive the financing contingency. If buyers failed to timely waive the financing contingency in writing, Woodman had the right to cancel the sale.

At about the time that the purchase agreement was prepared, Johnson withdrew from the intended purchase and Jonathan Lehrer-Graiwer took his place. Brogger and Lehrer-Graiwer decided to purchase the property through a limited liability company (LLC), but as of the date that CBRE prepared the draft purchase agreement, they had not

finalized the LLC filings. As a result, the draft purchase agreement that CBRE faxed to Woodman on May 21, 2002, did not identify the "buyer" of the property.

Woodman signed the draft purchase agreement and faxed it to CBRE on May 24. CBRE then faxed the draft purchase agreement to Brogger and Lehrer-Graiwer, asking them to "fill in 'Buyer'" and sign the agreement. After discussing the issue with CBRE, on May 31, 2002, Brogger identified the "buyer" as "Greg Brogger or Assignees," signed the draft purchase agreement, and faxed it to CBRE.

When she received the signed purchase agreement on May 31, Adrienne Herman, a CBRE broker, sent a fax to Woodman, congratulating it on the deal and attaching a "fully executed copy of the purchase agreement." That same evening, Brogger called Herman and reminded her that Woodman needed to initial its acceptance of the identity of the buyer. Herman contacted Woodman, and Woodman's president, Anil Mehta, initialed his acceptance on June 4, 2002.

II. Opening of Escrow and the Supplemental Escrow Instructions

The purchase agreement designated respondent First American as the escrow agent for the purchase of the property. On June 4, 2002, the day that Woodman initialed its acceptance of the buyer, Nancy Badzey of CBRE faxed a copy of the purchase agreement to First American. First American opened escrow the same day.

Badzey's fax asked First American to fax "wrap" (supplemental escrow) instructions to CBRE for review, and requested that the "wrap" instructions "call out contingency expiration dates so all parties are on the same page." Badzey advised First American that the purchase agreement was executed on June 4, 2002, the date that Woodman had initialed its acceptance of the identity of the buyer, and the financing contingency expired 45 days later, on July 19, 2002. Badzey asked that draft instructions be sent to CBRE "for [our] review," and instructed that "[a]ll original documents should be sent to the Seller and Buyer directly."

On June 11, Liz Aguilar of First American sent a copy of the supplemental escrow instructions to Badzey via messenger, and mailed a copy of the supplemental escrow

instructions to Brogger. She also attempted to email the supplemental escrow instructions to Woodman. However, because Aguilar used an erroneous email address, Woodman never received them. Aguilar was not aware at that time that Woodman had not received the supplemental escrow instructions, and Woodman was not aware that they had been sent.

On July 11, 2002, Brogger assigned to 1939 Argyle, LLC and Dundee Apartment Co. his right to purchase the Argyle property.

III. Woodman Cancels the Sale

On July 16, 2002, Anil Mehta, Woodman's president, sent a letter to CBRE, asserting that the time to remove the financing contingency had elapsed without action by the buyers, and that Woodman therefore was formally cancelling the sale "pursuant to cancellation rights contained in Paragraph 16 of" the purchase agreement.

Adrienne Herman of CBRE contacted Mehta and told him that the purchase agreement had not been fully executed until June 4, and that the deadline for removing the financing contingency therefore would not elapse until July 19. She pointed out that the July 19 date was set forth in the supplemental escrow instructions. Woodman responded that the acceptance date of the purchase agreement was May 31, not June 4, and thus the deadline to waive the financing contingency was July 15. Woodman further denied that it had ever received the supplemental escrow instructions.

On July 19, 2002, Lehrer-Graiwer sent a letter to Woodman giving notice of buyers' waiver of the financing contingency and insisting that the deal go forward. Woodman refused.

IV. The Lawsuit Against Woodman for Specific Performance and Subsequent Settlement

On August 14, 2002, 1939 Argyle, LLC and Dundee Apartment Co. (the two entities to whom Brogger had assigned his interest in the purchase agreement) filed suit against Woodman for specific performance.

Plaintiffs prevailed at trial. The judgment granted specific performance, directed Woodman to sell the property to plaintiffs for the contract price of $2,940,000, and awarded ancillary damages and attorney fees.

Woodman appealed, and following oral argument, the parties reached a settlement. Pursuant to the settlement, Woodman agreed to sell the property to the plaintiffs for $4.1 million, approximately $1.2 million more than the original sales price.

The transfer was consummated in October 2005. For tax reasons, Brogger and Lehrer-Graiwer, the two members of 1939 Argyle, LLC, purchased the property through the Lehrer-Graiwer Family Trust, the Lehrer-Graiwer Separate Property Trust, and 2218 N. Beachwood Drive, LLC. In conjunction with the purchase, 1939 Argyle, LLC transferred to the trusts and 2218 N. Beachwood Drive, LLC the portion of its causes of action against First American for the damages relating to the increased purchase price.

V. The Present Suit

Buyers filed the present suit against First American for breach of contract and negligence on April 4, 2006. The operative first amended complaint was filed May 2, 2007. It alleged that as a result of First American's failure to timely deliver the supplemental escrow instructions to Woodman, buyers paid an increased purchase price for the property, owed increased property taxes, and incurred costs and attorney fees in litigating the action against Woodman.

The case went to trial before a jury on August 27, 2007. The jury returned a special verdict for buyers, finding First American liable to all plaintiffs for breach of contract and negligence. It awarded damages as follows: 1939 Argyle, LLC, $306,646; Jonathan Lehrer-Graiwer, as trustee for the Lehrer-Graiwer Separate Property Trust, $577,356.35; Jonathan Lehrer-Graiwer, as trustee for the Lehrer-Graiwer Family Trust, $132,630.15; and 2218 N. Beachwood Drive, LLC, $710,011.50.

The jury also made a series of special findings relevant to the issue of the statute of limitations. Buyers had argued at trial that the present litigation, filed nearly four years after Woodman canceled the sale, was timely because their claim against First

American was equitably tolled during the litigation with Woodman. The jury agreed, making the following special findings:

(1) Buyers first suffered actual harm as a result of First American's negligence more than two years before the present suit was filed;

(2) Buyers gave First American timely notice of the claim against sellers to alert First American of the need to begin investigating the facts that formed the basis of the claim against First American;

(3) Buyers' delay in suing First American did not prejudice it; and

(4) Buyers acted reasonably and in good faith in delaying the present actions against First American.

VI. The Trial Court's Statute of Limitations Ruling

After trial, First American asked the trial court to find that, notwithstanding the jury's statute of limitations findings, buyers' negligence claim was time-barred as a matter of law because it was filed more than two years after the allegedly negligent acts.[1] In a written ruling, the court concluded that the negligence claim was timely, finding as follows: "Plaintiffs contend, and this court is satisfied, that all of the elements for equitable tolling have been satisfied. First American was given timely notice of plaintiffs' claims against Woodman and of the need to begin investigating the facts which form the basis for this present action. Trial Exhibit 55 [an August 12, 2002 letter from buyers' counsel to First American, discussed in First American's Cross-Appeal, part III, *post*] served to put First American on notice of the existence of the dispute concerning the date that the parties' purchase and sale agreement was accepted and the date on which buyer was required to have waived the loan contingency set forth in the subject purchase and sale agreement. First American drew those instructions and was party and privy to the entire transaction. First American was specifically directed to retain all files pending

---

[1] This assertion apparently pertains only to the negligence claim, which is governed by a two-year statute of limitations, *not* to the breach of contract claim, which is governed by a four-year statute of limitations. (Code Civ. Proc., §§ 337, 339, subd. (1).)

resolution of the buyers' legal action against Woodman. Consequently, First American was put on timely notice of the legal action against Woodman as well as First American's need to preserve all evidence pertaining to its own negligence."

The court continued: "The jury also found and this court likewise finds that no prejudice befell First American because it had been notified that Argyle's dispute with Woodman arose 'with respect to whether certain documents were or were not e-mailed or otherwise transmitted to seller.' Thus, First American had adequate notice to prepare any defense against any future claim. [¶] Lastly, as the jury found and as the court finds, plaintiffs acted reasonably and in good faith since, as was demonstrated at trial, plaintiffs' primary concern was to obtain the Argyle property which they could only have done by bringing a specific performance action against Woodman. Had the judgment against Woodman been affirmed on appeal, plaintiff would have been fully compensated and there would have been no need to bring this present action against First American."

Thus, the court concluded, "For the foregoing reasons, the court finds that plaintiffs' Negligence claim against First American was equitably tolled while plaintiffs pursued their claim for specific performance against seller Woodman and, as a result, the Negligence claim against First American was timely filed."

VII. Posttrial Proceedings

Judgment was entered on December 13, 2007, and notice of entry of judgment was served on December 20, 2007.

First American timely moved for judgment notwithstanding the verdict. In support of its motion, it contended: (1) there was no substantial evidence to support an award for special damages on the breach of contract claim because those damages could not reasonably have been foreseen by First American when the contract was entered; (2) there was no substantial evidence to support the negligence verdict because the damages were not proximately caused by First American; (3) there was no evidence to support a portion of the damage award; and (4) plaintiffs' negligence claim was time-barred.

First American also timely moved for a new trial. It contended: (1) there was no evidence that First American knew or reasonably should have known, at the time buyers and First American entered a contract, of the special circumstances leading to the harm for which buyers sought damages; (2) there was no evidence that buyers' damages were proximately caused by First American's negligence; (3) buyers' damages were not reasonably foreseeable; (4) buyers' negligence claim was time-barred; and (5) there was no evidence of gross negligence or willful misconduct by First American.

The court denied the motion for judgment notwithstanding the verdict, but granted the motion for new trial. The court stated: "As much as I would like to bring [an end to] this litigation, my problem is I cannot bring myself . . . to determine there is sufficient evidence in the record . . . to warrant a determination by the jury that the special damages claimed were reasonably foreseeable given the events I've articulated. . . . I think [it] was reasonably foreseeable because of the failure to see to it that the escrow instructions, the supplemental escrow instructions[,] were sent by First American[,] that a cancellation would be — could be claimed by Woodman. [I]t might [also] have been reasonably foreseeable that Argyle would sue [and] [a]s a consequence, incur attorney's fees and other special damages. But to take it beyond that[,] . . . that Argyle would prevail at trial; that Woodman would appeal; and that during the pendency of the appeal on the day of or perhaps in and around the same time as argument before the Court of Appeal took place negotiations would ensue whereby Argyle agreed to pay an additional sum of money to purchase the property [for] $1.16 million more[,] I don't think that was reasonably foreseeable . . . ."

On February 11, 2008, the court issued a "[f]urther order specifying grounds relied upon by court in granting motion [for new trial]." The order stated as follows: "On February 8, 2008[,] this court granted defendant First American['s] motion for new trial stating that an independent intervening cause was the substantial factor giving rise to and causing the damages claimed by plaintiffs. [¶] In compliance with the requirement that if a motion for new trial is granted the court must state the ground or grounds relied upon

by the court (C.C.P. section 657), the court states that the ground relied upon by the court is the insufficiency of the evidence to justify the verdict of the jury."

The order continued: "In the foregoing respect, the fact that plaintiffs paid $1.6 million more to purchase the subject property was due to plaintiffs' voluntary and uncoerced decision to do so while the appeal by Woodman Realty from the decision by Judge Hiroshige granting plaintiffs' suit for, inter alia, specific performance and damages was still pending and undecided by the Court of Appeal. If plaintiffs had lost on appeal and the trial court's decision had been reversed[,] it would have been because the appellate court had determined that the time for removal of the financing contingency had expired on July 15, 2002, whereas if the appellate court's decision had been to affirm Judge Hiroshige's decision, plaintiffs would have suffered no damages occasioned by First American Title Company."

VIII. Status Conference

Buyers filed a status conference statement on March 4, 2008. In that statement, buyers suggested, among other things, that the court "appears to have made a ruling that, as a matter of law, Plaintiffs' decision to settle with Woodman while the case was on appeal served as a superseding act to break the causation for any and all damages caused by First American's failure to properly send the supplemental escrow instructions to Woodman." Buyers requested that, pursuant to *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108, the court reconsider its ruling. Alternatively, buyers requested that "the Court clarify precisely its legal ruling. . . . As the record now stands, Plaintiffs are unclear whether there would be any justification in incurring the significant time and expense of a retrial if, as seems the only reasonable way to read the Court's order, it has determined that Plaintiffs are legally barred from recovering from First American. In that case, it would make much more sense, and save the parties, the Court and another jury considerable effort and expense, to proceed to an appeal and let the Court of Appeal determine the pertinent legal issues."

At the March 11 status conference, buyers repeated their request that the court clarify the nature of its ruling, asking whether they were "correct in reading that [the court] made a determination and found essentially that legally there was an intervening cause?" The court responded that "That's how one would read that," and it issued an order to show cause why it should not reconsider its new trial order.

On March 18, buyers filed a "Statement on OSC," stating as follows: "At the March 11, 2008 status conference, the Court asked the parties to brief the issue whether it has the authority to reconsider its February 8, 2008 order granting defendant First American's motion for a new trial. Plaintiffs maintain that, under *Le Francois v. Goel*, 35 Cal.4th 1094 (2005), the Court does have the authority. However, Plaintiffs have reviewed the authority cited by First American's counsel at the status conference, and acknowledge that the issue is not completely clear. In order to avoid taking more of the Court's time, and to introduce another possible appeal issue if the Court were to reconsider its February 8 ruling, Plaintiffs have elected to proceed directly to an appeal of the order granting new trial."

Buyers timely appealed from the order granting a new trial on March 18, 2008. First American timely cross-appealed from the judgment and order denying judgment notwithstanding the verdict on March 28, 2008.

BUYERS' APPEAL FROM NEW TRIAL ORDER

I. Standard of Review

The parties dispute the proper standard of review. Buyers contend that although a court's new trial orders generally are reviewed for abuse of discretion, they are subject to de novo review where, as here, the new trial order is based on an issue of law. First American disagrees, contending that the fact that the court granted the motion based on insufficiency of the evidence demonstrates that the court weighed the evidence and concluded that the "'weight of the evidence was against the verdict.'" Thus, it contends, the order should be reviewed for abuse of discretion.

"The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. [Citation.] [Code of Civil Procedure section] 657 sets out seven grounds for such a motion: (1) 'Irregularity in the proceedings'; (2) 'Misconduct of the jury'; (3) 'Accident or surprise'; (4) 'Newly discovered evidence'; (5) 'Excessive or inadequate damages'; (6) 'Insufficiency of the evidence'; and (7) 'Error in law.'" (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633.)[2] "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (§ 657.)

We agree with First American that, as a general matter, orders granting new trials are reviewed for abuse of discretion. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 859; see also *Lane v. Hughes Aircraft Co*. (2000) 22 Cal.4th 405, 412.) """"The reason for this is that the trial court, in ruling on the motion, sits not in an appellate capacity but as an independent trier of fact."""" (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 547.) In other words, the court is "'vested with the authority . . . to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact.' (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112.)" (*Casella v. SouthWest Dealer Services, Inc*. (2007) 157 Cal.App.4th 1127, 1159-1160.) Since the function of a new trial motion is to allow a reexamination of an issue of fact, we ordinarily review the grant of a new trial motion for abuse of discretion. (*In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 614.)

However, an appellate court has the power to look at the substance of a new trial ruling rather than just its title. (*In Re Coordinated Latex Glove Litigation, supra*, 99 Cal.App.4th at p. 614; *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 752-753 (*Fountain Valley*).)

---

[2] All further undesignated statutory references are to the Code of Civil Procedure.

"If the effect of the ruling is actually closer in nature to a directed verdict or a [judgment notwithstanding the verdict], then in such a case, the ruling may be deemed to have been based upon a conclusion of law, and de novo review is appropriate." (*In re Coordinated Latex Glove Litigation*, *supra*, 99 Cal.App.4th at p. 614.)

The court applied these principles in *Fountain Valley*, applying a de novo standard of review to the trial court's grant of a new trial for insufficiency of the evidence. There, after a jury returned a verdict for defendant on liability, the court granted a new trial, stating that it believed plaintiff acted "'totally reasonably'" as a matter of law. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 749.) The Court of Appeal held that under the circumstances of that case, the order granting a new trial must be reviewed de novo. It began by explaining that dispositive motions and motions for new trial serve very different purposes. While dispositive motions are intended to prevent defendants from any further exposure to legal liability when there is insufficient evidence for an adverse verdict, new trial motions allow reexamination of issues of fact. Accordingly, dispositive motions and motions for new trial are subject to different standards of review.

The court continued that the new trial and judgment notwithstanding the verdict (JNOV) statutes created the following "apparent anomaly": "The reason for the 'dispositive' motions is that the plaintiff cannot win, because the plaintiff has presented insufficient evidence to support a favorable judgment. Yet a new trial motion may *itself* be based on insufficient evidence to support a favorable judgment. (Code Civ. Proc., § 657, clause 6 ['. . . for any of the following causes . . . : [¶] . . . [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.'].) Moreover, even though there are some extra requirements on the judge before he or she may grant a new trial on insufficient evidence [fn. omitted], the fact remains that the trial judge may, in granting such a motion, draw inferences and resolve conflicts in the evidence different from that of the jury. [Citation.] Accordingly, it is natural to ask, if a trial judge is convinced that a litigant has no substantial evidence to justify a favorable judgment, why take the hard and narrow road of granting one of the dispositive motions with the attendant stringent standard of review when he or she can

take a much easier and wider path by granting a new trial?" (*Fountain Valley*, *supra*, 67 Cal.App.4th at pp. 751-752.)

The court answered this question by suggesting that the new trial statute contains "the following, but unstated, premise: When a trial judge grants a motion for new trial based on insufficiency of the evidence, it is *not* because the judge has concluded that the plaintiff *must* lose, but only because the evidence in the trial that actually took place did not justify the verdict. [Fn. omitted.] . . . *There is still the real possibility that the plaintiff has a meritorious case*." (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 752.) If there is no such possibility, the proper course is to grant judgment notwithstanding the verdict, not a new trial. (*Ibid*.) In the case before it, the court noted that the trial judge had indicated his belief that, given the reasonableness of the defendant's position, the plaintiff could never prevail. Thus, the granting of the new trial motion "was a de facto judgment notwithstanding the verdict" and should be reviewed according to those standards. (*Id*. at pp. 752-753.)

In the present case, as in *Fountain Valley*, the trial court's oral and written statements suggest that the court granted the new trial motion because it believed that, *as a matter of law*, buyers could not demonstrate a causal link between their alleged damages and First American's conduct. At the new trial hearing, the trial court stated that it could "not bring [itself]" "to determine there is sufficient evidence in the record . . . to warrant a determination by the jury that the special damages claimed were reasonably foreseeable." It made a similar statement in its written order, indicating that "an independent intervening cause was the substantial factor giving rise to and causing the damages claimed by plaintiffs." And, when counsel asked the court whether he was "correct in reading that [the court] made a determination and found essentially that legally there was an intervening cause," the court responded that "That's how one would read that."[3] Under these circumstances, we conclude that the trial court found no

---

[3] First American urges that we may not consider this comment because it "was made at a hearing held on March 11, 2008 [citation to record], long after expiration of the trial court's jurisdictional 60-day period to rule on a new trial motion." According to

causation as a matter of law, rather than in the exercise of its discretion, and we therefore review the new trial order de novo.

II. Superseding Cause

As we have said, that trial court granted a new trial because it concluded that an "independent intervening cause"—specifically, buyers' "voluntary and uncoerced decision" to settle their claim against Woodman while the matter was on appeal—was "the substantial factor giving rise to and causing the damages claimed by plaintiffs." For the following reasons, we conclude that this determination was erroneous.

Under California law, the measure of damages for most tortious conduct "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (Civ. Code, § 3333; see also *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1054 ["The measure of damages in most tort cases is all loss proximately caused by the wrongdoing, whether anticipated or not."]; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp*. (2005) 130 Cal.App.4th 1078, 1094 [same].)[4] Accordingly, an independent intervening act by a plaintiff or third party does not, as a matter of law, necessarily break the chain of proximate cause. Rather, so long as the intervening act was a reasonably foreseeable result of the original actor's wrongdoing, "'[t]he usual rule

---

First American, the court accordingly lacked the power to "offer an interpretation of its [new trial] order that was more narrow than and not expressed in its order." The sole case First American cites for this proposition, however, does not support it. (See *Jones v. Sieve* (1988) 203 Cal.App.3d 359, 369-370.)

[4] The contract measure of damages is similar: special damages for breach of contract are recoverable as long as "the losses . . . are foreseeable and proximately caused by the breach of a contract. (Civ. Code, § 3300.)" (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School* Dist. (2004) 34 Cal.4th 960, 969.) Because the jury awarded identical damages under both causes of action—i.e., negligence and breach of contract—the jury's verdict can be sustained under either the tort or contract measure of damages.

is "that the intervening act of a third person does not relieve the original wrongdoer of liability.'" [Citation.]" (*Jacoves v. United Merchandising Corp*. (1992) 9 Cal.App.4th 88, 111.)

There is an exception, however, when an intervening act is a "superseding cause." (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1320.) "'"[T]he term 'superseding cause' means 'an independent event [that] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen that the law deems it unfair to hold him responsible.'" [Citation.] . . . "'[W]here [an] injury was brought about by a later cause of independent origin . . . [the question of proximate cause] revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If *either* of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff. . . .'" [Citation.] Thus, "[t]he defendant remains . . . liable if either the possible consequence might reasonably have been contemplated or the defendant should have foreseen the possibility of harm of the kind that could result from his act." [Citations.]' ([*People v. Brady* (2005)] 129 Cal.App.4th [1314,] 1324-1326, fn. omitted.)" (*People v. Dawson* (2009) 172 Cal.App.4th 1073, 1094;[5] see also *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 725 ["[F]or an intervening act properly to be considered a superseding cause, the act must have produced 'harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.'"]; *Kahn v. East Side Union High School Dis*t. (2003) 31 Cal.4th 990, 1016-1017 ["The question whether plaintiff's voluntary decision to practice the shallow-water dive without supervision constituted a *supervening*

---

[5] Although *People v. Dawson* involves the application of criminal law, rather than civil tort law, it makes clear that its discussion of superseding cause applies equally to both. (172 Cal.App.4th at p. 1093 ["'"The principles of causation apply to crimes as well as torts."'"].)

cause of her injury depends on whether her conduct '"was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force . . . then that hazard is within the duty, and the intervening force is not a superseding cause."'"]; *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC*, *supra*, 127 Cal.App.4th at p. 1320 [""[a]n independent intervening act is a superseding cause relieving the actor of liability for his negligence only if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable""].)

Whether the trial court properly granted the new trial motion thus turns on two related questions: (1) Whether buyers' decision to settle with Woodman was reasonably foreseeable by First American; or (2) if not foreseeable, whether it caused injury of a type which was foreseeable. For guidance on this issue, we look to *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, where the court considered a similar issue. There, the defendant attorney (attorney) represented plaintiffs (sellers) in the sale of their business to cross-defendants (buyers). During the negotiations for the sale of the business, the buyers presented the sellers with a proposed final agreement that stated that sellers warranted that the business had no liabilities other than those shown on an unaudited balance sheet. Attorney told the buyers that sellers could not warrant the accuracy of the balance sheet, and buyers responded that they understood and would deem the sellers to be warranting the accuracy of the information in the balance sheet only to their best knowledge. Attorney then advised the sellers to sign the agreement, and the sellers did so. (*Id*. at p. 199.)

The balance sheet was correct to the best of the sellers' knowledge; however, shortly after the sale was consummated, the buyers made a claim against the sellers based on a $200,000 understatement in the balance sheet of which the sellers had been unaware. The sellers settled the claim without litigation and then filed a legal malpractice action against the attorney. (*Cicone v. URS Corp.*, *supra*, 183 Cal.App.3d at p. 199.) The attorney, in turn, filed a cross-complaint against the buyers, urging that buyers' statements that they would accept the balance sheet as correct only to the best of the

sellers' knowledge was false. Buyers demurred to the cross-complaint, and trial court sustained the demurrer without leave to amend. (*Id*. at pp. 198, 206.)

On appeal, buyers urged that the judgment should be affirmed because the attorney's damages were not caused by their alleged misrepresentations, but rather by the settlement of the prior litigation. In other words, they contended, the settlement of the controversy between buyers and sellers was a superseding cause of harm to the attorney for which they could not be liable as a matter of law. (*Cicone v. URS Corp.*, *supra*, 183 Cal.App.3d at p. 206.) The Court of Appeal disagreed and reversed. It explained: "Ordinarily, for[e]seeability is a question of fact for the jury. 'It may be decided as a question of law only if, "under the undisputed facts there is no room for a reasonable difference of opinion."' (*Bigbee v. Pacific Tel. & Tel. Co*. (1983) 34 Cal.3d 49, 56, quoting from *Schrimscher v. Bryson* (1976) 58 Cal.App.3d 660, 664.) '"[Foreseeability] is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct." (2 Harper & James, Law of Torts [1956] § 18.2, at p. 1020.)' (*Bigbee v. Pacific Tel. & Tel. Co*., *supra*, 34 Cal.3d at p. 57.) An actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct. (*Vesely v. Sager* (1971) 5 Cal.3d 153, 163.) If the act of the third party is not reasonably foreseeable, not a normal consequence in the situation, it is a superseding cause. (*Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 944.)" (*Cicone v. URS Corp.*, *supra*, 183 Cal.App.3d at pp. 206-207.)

The court concluded that under the facts of the case before it, the settlement between buyers and sellers was not a superseding cause as a matter of law: "Accepting the proposed amended allegations as true, a trier of fact could conclude it is reasonably foreseeable that [sellers], faced with a large monetary demand and a prospect of an expensive defense, would settle the case rather than litigate the issues. If so found, this

would be a foreseeable intervening cause, not a superseding cause, and would not relieve [buyers] of potential liability." (*Cicone v. URS Corp.*, *supra*, 183 Cal.App.3d at p. 207.)

We believe *Cicone*'s analysis is correct, and we adopt it here. Like the *Cicone* court, we find that litigation is a foreseeable consequence of tortious conduct. Further, like *Cicone*, we conclude that settlement is a foreseeable consequence of litigation. (E.g., *Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 261 ["Most cases . . . settle"]; *Ciulla v. Rigny* (D. Mass. 2000) 89 F.Supp.2d 97, 102, fn. 7 ["'Studies show that where people have recourse to a jury trial . . . the great bulk of cases ultimately settle."]; Folberg, Rosenberg, & Barret, Use of ADR in California Courts: Findings & Proposals (1992) 26 U.S.F.L.Rev. 343, 350-351 ["Over ninety percent of all civil cases filed in California settle or are otherwise disposed of prior to trial" and "a high percentage of settlements occur 'on the courthouse steps.'"].)

For this reason, unlike the court below, we believe that a trier of fact reasonably could conclude that it was foreseeable that buyers, faced with the uncertainties of litigation and the possibilities both of losing the opportunity to purchase the building and of being saddled with sellers' attorney fees, would settle the case. As such, the settlement is not as a matter of law """"'an independent event [that] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen that the law deems it unfair to hold him responsible.'""" (*People v. Dawson*, *supra*, 172 Cal.App.4th at p. 1094.) The trial court thus erred in concluding that the settlement was a superseding cause as a matter of law.[6]

III. Alternative Grounds for Granting a New Trial

First American contends that even if we conclude that the trial court erred by granting a new trial for insufficiency of the evidence, we may and should affirm the new trial order on alternative grounds. Specifically, First American urges that the trial court

---

[6] For the same reason, we reject First American's contention in its cross-appeal that judgment notwithstanding the verdict should have been granted because buyers' damages were not reasonably foreseeable.

erroneously permitted a witness for buyers to testify about an email experiment he performed, which First American contends was "manifestly irrelevant, not probative of any fact or issue, hearsay, unduly prejudicial, and wholly lacking in foundation." The admission of this testimony, First American contends, constituted an irregularity in the proceedings, was an improper order, and constituted an abuse of discretion. (§ 657, subd. (1).)

Buyers assert that First American did not raise this alleged erroneous admission of evidence in support of its motion for new trial; accordingly, they contend, the issue is forfeited on appeal. We agree. "'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]'" (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.)

FIRST AMERICAN'S CROSS-APPEAL

First American cross-appeals from the judgment and the trial court's order denying its motion for judgment notwithstanding the verdict.[7]

I. Standard of Review

"'Well-settled standards govern judgments notwithstanding the verdict: "When presented with a motion for JNOV, the trial court cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light

---

[7] The notice of cross-appeal, filed less than 20 days after the clerk mailed notification of buyers' appeal, was timely. (Cal. Rules of Court, rule 8.108(e).)

most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied. [Citation.] [Citation.] The same standard of review applies to the appellate court in reviewing the trial court's granting [or denying] of the motion. [Citations.] Accordingly, the evidence . . . must be viewed in the light most favorable to the jury's verdict, resolving all conflicts and drawing all inferences in favor of that verdict." [Citation.]' (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 258-259.)" (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 49.)

Similarly, "in reviewing a challenge to the sufficiency of the evidence, we are bound by the substantial evidence rule. All factual matters must be viewed in favor of the prevailing party and in support of the judgment. All conflicts in the evidence must be resolved in favor of the judgment." (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1747.)

II. Causation

To recover on a cause of action for negligence, plaintiffs must show that the defendants' breach of duty was a "proximate" or "legal" cause of their injury. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 772; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

By its special verdict, the jury found that First American's breach of duty was a legal cause ("substantial factor") of buyers' injuries. First American challenges this finding, asserting that: (1) buyers' contention that sellers would have acted differently if they had received the supplemental escrow instructions is speculative as a matter of law; (2) buyers' theory of causation is not supported by substantial evidence; (3) buyers' estoppel theory fails as a matter of law; and (4) the misaddressed email was not the proximate cause of buyers' harm. We address each contention below.

A. Buyers' Legal Theory Is Not "Inherently Speculative"

First American contends that buyers' theory of causation is inherently speculative and thus fails as a matter of law. It explains that buyers' theory at trial was that if First American had timely delivered the escrow instructions, the parties would have realized that they had a misunderstanding in time to correct it. Such a theory, First American contends, required the jury to determine "that Woodman would have acted differently under different circumstances" and thus is speculative as a matter of law.

We do not agree. As our Supreme Court has said in the context of attorney malpractice, "[d]etermining causation *always* requires evaluation of hypothetical situations concerning what might have happened, but did not." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242, italics added.) The court continued: "[T]he crucial causation inquiry is *what would have happened* if the [defendant] had not been negligent. *This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative*. (E.g., 1 Dobbs, The Law of Torts (2000) § 169, p. 411; Robertson, *The Common Sense of Cause in Fact* [(1997)] 75 Tex. L.Rev. [1765,] 1770.)" (*Viner v. Sweet*, *supra*, 30 Cal.4th at p. 1242, italics added.) In other words, *every* tort case requires the trier of fact to determine what the world would have looked like in the absence of the defendant's alleged negligence. That such an inquiry is speculative to some degree does not mean that tortious conduct is not actionable.

Of course, the inherently speculative nature of *all* tort cases does not mean that *some* cases are not too speculative as a matter of law. The cases that First American cites are precisely of this nature—that is, each holds that under the facts of the particular case, the plaintiff cannot establish to a reasonable certainty that "anything would have been different" if the defendant had not acted tortiously. (*E.g.*, *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104-105 [spelling bee competitor could not prove that he suffered damages because another child was permitted to participate in competition, allegedly in violation of the rules: "Gavin cannot show that he was injured by the breach. Gavin lost the spelling bee because he misspelled a word, and it is irrelevant that he was defeated by a contestant who 'had no right to advance in the

contest.'"].) We thus turn to the facts of the case before us to determine whether buyers introduced substantial evidence of causation.

B. There Was Substantial Evidence That First American's Negligence Caused Buyers' Damages

First American asserts that the trial court erred in denying its motion for judgment notwithstanding the verdict because there was not substantial evidence that its alleged negligence caused buyers' damages. Specifically, First American contends that the evidence did not establish that but for the failure to deliver the supplemental escrow instructions to Woodman, the sale would have been consummated. To the contrary, First American urges that the evidence was undisputed that even if Woodman *had* timely received the supplemental escrow instructions, it would neither have reviewed the instructions nor attempted to correct them prior to July 15, the date on which the sale was cancelled. Thus, First American urges that buyers did not establish causation as a matter of law.

To prove causation, buyers were required to show by a preponderance of the evidence that First American's alleged negligence "was an actual, legal cause" of their injuries. (*Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1385-1386, quoting *Saelzler*, *supra*, 25 Cal.4th at p. 769.) To show actual or legal causation, buyers were required to show that First American's negligence was a "substantial factor" in bringing about the injury—i.e., that "'*the harm would [not] have been sustained . . . if [First American] had not been negligent*.'" (*Viner v. Sweet, supra*, 30 Cal.4th at p. 1240.) Causation need not be proved with "absolute certainty": "Rather, the plaintiff need only '"introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result."' (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205, quoting Prosser & Keeton on Torts (5th ed. 1984) § 41, p. 269, fns. omitted.)" (*Viner v. Sweet, supra*, 30 Cal.4th at p. 1243.) Thus, to demonstrate that First American's negligence was a legal cause of their harm, buyers were required to show that it was more probable than not that timely

delivery of the supplemental escrow instructions would have avoided the cancellation of the sale. (See *Sandoval v. Bank of America*, *supra*, 94 Cal.App.4th at pp. 1385-1386.)

In reviewing the evidence of causation, we apply the substantial evidence standard of review. "'[W]e indulge in every reasonable inference to uphold the verdict if possible and defer to the jury's assessment of the credibility of the witnesses. [Citation.]' (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 889; see *Greathouse v. Amcord, Inc*. (1995) 35 Cal.App.4th 831, 836-837.) 'We view the evidence most favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.' (*Oregel v. American Isuzu Motors, Inc*. (2001) 90 Cal.App.4th 1094, 1100.)" (*Cardinal Health 301, Inc. v. Tyco Electronics Corp*. (2008) 169 Cal.App.4th 116, 146.)

Several witnesses for buyers testified that the purpose of supplemental escrow instructions is to be sure that buyers and sellers are aware of key dates. In this regard, Liz Aguilar, an escrow officer employed by First American, testified as follows:

"Q. Is it correct that part of the reason for the supplemental escrow instruction[s] is to make sure that both parties are on the same page as to the pertinent dates, correct?

"A. That is correct."

Adrienne Barr, one of the real estate agents involved in the sale, gave similar testimony, stating as follows:

"Q. [I]s it the practice of you or your team to ask the escrow company to put in the supplemental escrow instructions key deadlines?

"A. Yes.

"Q. And what's the purpose of having them put the key deadlines in the supplemental escrow instructions?

"A. We always want to make sure that everyone is on the same page with regards to the dates of the transaction."

And Greg Brogger, one of the buyers, testified:

"Q. Do you have any practice about what steps to take if there's something wrong or different from what your understanding is with respect to the supplemental escrow instructions?

"A. If it was important, I would call immediately to make sure I was on the same page with the other party of the transaction.

"Q. If the financing contingency deadline were different from the one you had calculated, would that be something you would consider important?

"A. Extremely important, yes."

From this testimony, the jury reasonably could have concluded that given the significance of the supplemental escrow instructions, a reasonable seller would have reviewed them immediately upon receiving them, and would have brought to the buyer's attention any significant errors. Further, nothing in the testimony of Ritesh Desai, the representative of First American who should have received the supplemental escrow instructions, suggested that he would not have acted as a reasonable seller. His testimony is ambiguous, and thus we quote, rather than summarize it:

"Q . . . I presume that you have dealt with a lot of deals where . . . escrow companies have sent supplemental escrow instructions, correct?

"A Yes.

"Q In fact that's pretty common, right?

"A Correct.

"Q I presume it's your normal custom and practice when you receive the supplemental escrow instructions, you review them to make sure that you think it is correct, right?

"A Yes, anything for that record, even initial or anything because we have to sign it.

"Q So in your custom and practice, if you receive supplemental escrow instructions and they have dates that you believe are wrong, would you contact the escrow company to inquire as to why those dates are there?

"A Unless until we have to sign it.

"[. . . . . .]

"Q . . . Was it your general practice that if you find errors in supplemental escrow instructions that you will contact the escrow company?

"A Not necessarily.

"Q So there are instances where you'll see errors in the escrow instructions and you'll ignore them?

"A Unless until we have to sign it and agree to it.

"Q Before the time you have to sign and agree to it, you will contact the escrow company?

"A Unless until we have to sign that up — supplemental escrow instructions and send it to them or we have to approve it, that's the time you objected.

"Q Right. You understand in your general custom and practice at some point you need to sign the supplemental escrow instructions, correct?

"A Yes. At the later part, during the time of closing.

"[. . . . . .]

"Q [Y]ou have had instances where there has been some error or what you thought to be an error in the supplemental escrow instruction[s]?

"A Right.

"Q In those instances did you bring them to someone's attention?

"A I don't recall exactly at that point of time or during the time of the closing. Yes, we have to review it, not necessarily at the time we receive it.

"[. . . . . .]

"Q I understand that, but in your dealings with hundreds of closings, don't you generally prefer that the buyer and the seller are in agreement on all the key terms of the transaction?

"A Should be.

"[. . . . . .]

"Q . . . . Isn't part of the reason for supplemental escrow instructions, it allows all parties to be in agreement on whatever dates need to be finalized?

"A As I said before, the idea is to be on the same page, all of them."

Although this testimony is far from unambiguous, a jury reasonably could have interpreted it to mean that because Desai understands that he will be required to initial or sign supplemental escrow instructions, it is his practice to review such instructions when he receives them. A jury also reasonably could interpret the testimony to mean that although Desai would not "necessarily" object to errors in supplemental escrow instructions, he would object in some circumstances.

The above-cited testimony is a slender reed upon which to hang a theory of tort causation. However, having "'view[ed] the evidence most favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor'" (*Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, *supra*, 169 Cal.App.4th at pp. 145-146), we believe that a jury reasonably could have concluded that (1) given the significance of the supplemental escrow instructions, a reasonable seller would have immediately reviewed them and objected to any errors, and (2) nothing in Desai's testimony suggested that he would not have acted as a reasonable seller. Accordingly, we conclude that there was substantial evidence to support the jury's conclusion that First American's failure to timely deliver the escrow instructions was more likely than not the cause of buyers' harm.[8]

C. Buyers Established Proximate Cause

First American asserts that even if its negligence was the "cause in fact" of buyers' injuries, it was not the "proximate cause." We do not agree.

"One aspect of causation is cause in fact or actual cause: Was the defendant's conduct '"a substantial factor in bringing about the injury."' [Citation.] The other is legal or proximate cause. [¶] '"'Legal cause' exists if the actor's conduct is a

---

[8] Because we have found substantial evidence of causation, we do not reach First American's alternative contention regarding estoppel.

"substantial factor" in bringing about the harm and there is no rule of law relieving the actor from liability. [Citations.]"' [Citations.] '"The doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, he will nevertheless be absolved because of the manner in which the injury occurred. Thus, where there is an independent intervening act which is not reasonably foreseeable, the defendant's conduct is not deemed the 'legal' or proximate cause."' [Citation.]" (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 665-666.)

We have already concluded that buyers' settlement with Woodman was not an independent intervening act (see Buyers' Appeal from New Trial Order, part II, *ante*), and First American does not suggest any other established legal principles that would absolve it of liability under the facts of this case. Accordingly, we conclude that there was substantial evidence that First American's negligence was the proximate cause of buyers' harm.

III. Statute of Limitations/Equitable Tolling

Buyers' negligence claim against First American is governed by a two-year statute of limitations. (§ 339.) "However, courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." (*Addison v. State of California* (1978) 21 Cal.3d 313, 317.) This policy is referred to as the doctrine of "equitable tolling."

Buyers argued at trial that their negligence claim, filed nearly four years after sellers canceled the sale, was timely because the statute of limitations was equitably tolled during the litigation against sellers. Specifically, they argued that First American was timely put on notice of a potential claim against it and the need to preserve relevant evidence by an August 12, 2002 letter from buyers' counsel to First American, which stated as follows: "As you are aware, a dispute has arisen by and between seller and buyer (identified above) with respect to the date that the parties' purchase and sale agreement was accepted. The parties further dispute the date on which buyer was

required to waive the loan contingency set forth in the subject purchase and sale agreement. [¶] I have been advised by . . . the authorized representative of buyer, that issues have arisen with respect to whether certain documents were or were not e-mailed or otherwise transmitted to seller. As a result, and pending the resolution of an arbitration or court action regarding buyer's claims against seller, we hereby request that neither you, First American nor anyone acting on its behalf take any steps that would result in the intentional or unintentional deletion or destruction of any hard paper or electronic (including all e-mails or related error messages) communications or documents regarding the above transaction."

The jury made findings in buyers' favor and, in a written ruling, the trial court found that buyers' claims were not barred by the statute of limitations. (See Factual and Procedural Background, part VI, *ante*.)

First American challenges this finding. It asserts that to establish the statute of limitations was equitably tolled, sellers had to prove "timely notice and lack of prejudice to defendant, and reasonable and good faith conduct on the part of the plaintiff." First American does not challenge the trial court's findings of lack of prejudice and reasonable and good faith conduct, but it asserts that the trial court erred as a matter of law by concluding that buyers timely notified First American of their claims. It contends that for notice to have been timely, buyers had to provide notice within the limitations period of "'plaintiffs' claims and their *intent to litigate*'" against First American. First American claims that buyers did not do so: While they indisputably gave First American notice of their claim against sellers, they "never provided First American with the required notice of a claim against First American or that Argyle 'inten[ded] to litigate' against First American."

Buyers disagree. They assert that the timely notice requirement means only that "'"the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim."'" They assert that the August 12, 2002 letter quoted above adequately did so, and thus that First American

received timely notice for purposes of the equitable tolling doctrine. We consider these issues below.

A. Applicable Law

The doctrine of equitable tolling was first articulated by the Supreme Court in *Elkins v. Derby* (1974) 12 Cal.3d 410 (*Elkins*). There, plaintiff filed an application for workers' compensation benefits; when the workers' compensation referee determined that plaintiff was not an employee at the time of his injury, plaintiff filed a personal injury action. Although the personal injury action was filed more than a year after plaintiff's injury, plaintiff claimed that it was not time-barred because the statute of limitations was tolled while he pursued his workers' compensation claim. (*Id*. at p. 413.) The Supreme Court agreed. It noted a line of California cases that "points towards the principle that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'" (*Id*. at p. 414, quoting *Myers v. County of Orange* (1970) 6 Cal.App.3d 626, 634.) The court applied the principle in the present case, noting that its application would not frustrate the primary purpose of the statute of limitations—to "'[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" (*Elkins, supra*, 12 Cal.3d at p. 417, fn. omitted.) It explained: "Defendants' interest in being promptly apprised of claims against them in order that they may gather and preserve evidence is fully satisfied when prospective tort plaintiffs file compensation claims within one year of the date of their injuries. [Fn. omitted.] . . . After the filing of a compensation claim, the employer can identify and locate persons with knowledge of the events or circumstances causing the injury. By doing so, he takes the critical steps necessary to preserve evidence respecting fault." (*Id*. at pp. 417-418.) Moreover, the court said, equitable tolling avoided "an awkward duplication of procedures" made necessary "[i]f, in order to avert loss of his rights, an injured party is

forced to initiate proceedings with both the compensation board and a superior court," thus bringing "onerous procedural burdens upon himself, his employer, and the already overtaxed judicial system." (*Id.* at p. 420.)

The Supreme Court again applied equitable tolling in *Addison v. State of California*, *supra*, 21 Cal.3d 313 (*Addison*), holding that the filing of an action in federal district court suspended the running of the limitations period with regard to a second state court action. There, plaintiffs filed a tort action in federal court alleging violations of state and federal law. After defendants moved to dismiss the federal action for lack of jurisdiction, plaintiffs refiled their claims in state court. The Supreme Court held that the state court action was timely because the statute of limitations was tolled during the period during which plaintiffs' claims were pending in federal court. (*Id.* at pp. 315-316.) It explained: "It is fundamental that the primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available. '[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.' [Citations.] The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which through the unexcused lapse of time, have been rendered difficult or impossible to defend. However, courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." (*Id.* at p. 317.) Application of this policy, the court said, requires "timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." (*Id.* at p. 319.) The court found these elements were met in the case before it because the same set of facts were relevant to the federal and state claims, defendants were timely notified of the action and had the opportunity to begin gathering their evidence and preparing their defense, and no prejudice to defendant was shown. (*Ibid.*) The court concluded: "We have previously indicated that the equitable tolling doctrine fosters the policy of the law of this state which favors avoiding forfeitures and allowing good faith litigants their day in court. As with other general

equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the . . . limitations statute. [Citations.] [¶] In our view, the balance in this case must be struck in plaintiffs' favor. If the tolling doctrine were not applied, plaintiffs would be denied a hearing on the merits of their claim." (*Id*. at pp. 320-321.)

In the wake of *Elkins* and *Addison*, equitable tolling has been applied in a variety of different contexts. Of particular relevance here, the Courts of Appeal have wrestled with application of equitable tolling where a first suit, the pendency of which is alleged to have tolled the running of the statute of limitations, is brought against a different defendant than is sued in the second suit. The Courts of Appeal have taken two different approaches in these circumstances. The first approach, articulated in *Garabedian v. Skochko* (1991) 232 Cal.App.3d 836 and *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 956, permits equitable tolling only where, prior to the expiration of the statute of limitations, the plaintiff unequivocally notifies the second defendant of its intent to sue. The second approach, articulated in *Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925 and *Structural Steel Fabricators, Inc. v. City of Orange* (1995) 40 Cal.App.4th 459, does not require unequivocal notice of an intent to sue; instead, it permits equitable tolling so long as defendant was aware of the first suit and has not been prejudiced by the delay.

In *Garabedian v. Skochko, supra*, 232 Cal.App.3d 836, a real estate agent was injured when he slipped and fell into a swimming pool at a home owned by the Department of Housing and Urban Development (HUD). (*Id*. at p. 839.) Plaintiff initially pursued an action in federal court against the United States; later, he filed a negligence action in state court against the independent manager of the property. (*Ibid*.) The Court of Appeal held that the limitations period applicable to the second suit was not equitably tolled while plaintiff pursued the first action. It explained: "We assume, as the complaint alleges, that respondent had notice of the claim filed with HUD. We conclude, however, that the doctrine of equitable tolling does not apply merely because defendant B

has obtained timely knowledge of a claim against defendant A for which defendant B knows or believes he may share liability." (*Id*. at p. 847.) Thus, the court concluded, equitable tolling did not apply in this case because, although the filing of the claim with HUD put the property manager on notice of plaintiff's intended suit against the United States, it did not put him on notice of plaintiff's intended suit against him. (*Id*. at p. 848; see also *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.*, *supra*, 98 Cal.App.4th at p. 956 [statute of limitations was not equitably tolled where second defendant was not given notice, within the limitations period, that plaintiff would hold it liable for tort for which plaintiff had sued first defendant].)

In *Stalberg v. Western Title Ins. Co.*, *supra*, 27 Cal.App.4th 925 (*Stalberg*), the plaintiffs were downstream property owners. Defendant, a title insurer, drafted and recorded deeds for several upstream property owners that included a fictitious easement across plaintiffs' properties. (*Id*. at pp. 929-930.) Plaintiffs sued the upstream property owners to quiet title; later, they sued the title company for slander of title. (*Id*. at p. 930.) The Court of Appeal held that the three-year limitations period applicable to the second suit was equitably tolled during the pendency of the first. The court explained: "Plaintiffs pursued the legal remedy which most readily addressed the cloud on their title—a quiet title action against the upstream property owners. They gave timely notice to defendant, and defendant participated in the quiet title action both by partially financing it and by receiving frequent updates on its progress from plaintiffs' attorney. During the progress of the quiet title litigation, plaintiffs learned that defendant was responsible for the recording of the fictitious easement. Plaintiffs corresponded with defendant, informing defendant of their awareness of its culpability in this matter, and, upon the completion of the quiet title action, plaintiffs promptly filed an action against defendant for slander of title." (*Id*. at pp. 932-933.) It concluded: "Since plaintiffs selected the legal remedy 'designed to lessen the extent of [their] injuries,' gave timely notice to defendant and acted reasonably and in good faith in pursuing first the quiet title action and then this action, equity favors tolling the limitations period unless prejudice to defendant will result therefrom." (*Id*. at p. 933.)

The court applied a similar test in *Structural Steel Fabricators, Inc. v. City of Orange*, *supra*, 40 Cal.App.4th 459 (*Structural Steel*). There, the plaintiff, a subcontractor, entered into a contract with a general contractor to perform work for the City of Orange. The general contractor paid plaintiff only part of what it was owed, and the plaintiff sued and obtained a default judgment. When the general contractor filed for bankruptcy, plaintiff sued the city. Plaintiff admitted that the statute of limitations had expired several months earlier, but asserted that the statute had been equitably tolled while it pursued a remedy against the general contractor. (*Id*. at pp. 462-463.) The Court of Appeal agreed. With regard to the issue of notice, the court held that the city had been timely notified of plaintiff's potential claim against it through a letter from the plaintiff that stated in part as follows: "'[W]e recently filed a subcontractor's construction collection action against I.D.C. and your surety (Contractor's Surety Bonding Co.). We hear now that your surety was not a proper surety and that they may be unable to protect the job. Is there another surety? We had a stop notice and need to know for sure who we should be suing. If your surety was not a properly registered surety with the insurance authorities, it might also create liability back upon the city (although we haven't researched this yet). Please respond as soon as possible.'" (*Id*. at p. 466.) Through this letter, the court said, the city "clearly" had notice sufficient to meet the first element of equitable tolling. (*Ibid*.)

B. Analysis

We believe that the approach articulated in *Stalberg* and *Structural Steel* is most consistent with the equitable concerns discussed by the Supreme Court in *Elkins* and *Addison*. In those cases, the Supreme Court emphasized the need to avoid prejudice to a potential defendant while also avoiding "duplicative proceedings" that are "inefficient, awkward and laborious." (*Elkins*, *supra*, 12 Cal.3d at p. 420.) We believe that a bright line rule, requiring unequivocal notice of an intention to sue prior to the running of the statute of limitations, does not adequately balance these competing concerns in all cases. Rather, like the courts in *Stalberg* and *Structural Steel*, we believe that notice to a

potential defendant is sufficient if it puts the defendant on notice of the need to preserve evidence relevant to the claim, so long as defendant is not prejudiced by the delay.

In the present case, the trial court did not abuse its discretion by concluding that the August 12, 2002 letter from buyers' counsel to First American was sufficient to equitably toll the running of the statute of limitations with respect to buyers' claims against First American. Although it did not unequivocally warn First American of buyers' intended suit, it advised First American of the existence of the dispute and that "issues have arisen" with regard to whether First American had transmitted certain documents to sellers. Significantly, it also put First American on notice of the need to preserve all documentary evidence relevant to the dispute, thus avoiding the concern with "stale claims" that the statute of limitations is designed to avoid. Thus, in the absence of any claim of prejudice (which First American does not assert), the letter and the suit against Woodman were sufficient to toll the running of the statute of limitations.

IV. Damages

First American asserts that 73.6 percent of the damages awarded to buyers cannot be recovered. It reasons that when escrow was opened, Dundee Apartment Co. was expected to hold approximately 73.6 percent of the Argyle property. When the sale was delayed, however, Dundee invested in another property and was not a party to this litigation. Further, First American contends, although buyers suggested at trial that Dundee assigned its rights to 1939 Argyle, LLC, "there is no evidence that Dundee assigned [its] 'rights' against First American." Therefore, First American argues that buyers cannot recover 73.6 percent of the damages suffered.

We do not agree. Greg Brogger testified at trial that when Dundee purchased another property, it assigned its right to purchase the Argyle property to 1939 Argyle, LLC. Having done so, it did not also have to assign its rights against First American: because 1939 Argyle, LLC acquired from Dundee the right to purchase the Argyle property for $2.9 million, it also acquired the right to recover from First American any damages it suffered when First American negligently caused it to lose that right. (See,

e.g., *Casa Eva I Homeowners Assn. v. Ani Construction & Tile, Inc*. (2005) 134 Cal.App.4th 771, 783 ["'An assignment carries with it all the rights *of the assignor*. [Citations.] "The assignment merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking [*its*] rights and remedies, subject to any defenses which the *obligor* has against the assignor prior to notice of the assignment."""].)[9]

DISPOSITION

The order granting a new trial is reversed, and the judgment for buyers is reinstated. Buyers shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.

---

[9] This conclusion also disposes of First American's contention that the damage award should be offset by the increased value that 1939 Argyle, LLC's coappellants received in the property.